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Supreme Court, U.S.
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NO: _____

IN THE

SUPREME COURT OF THE UNITED STATES

VIRGINIA MEISTER – PETITIONER

v.

STATE OF INDIANA AND THE CITY OF UNION CITY- RESPONDENTS

ON PETITION FOR WRIT OF CERIORARI TO THE INDIANA COURT OF APPEALS

APPENDIX

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ORDER TO BE REVIEWED

STATE OF INDIANA	)	IN THE
	)	RANDOLPH
	)	SUPERIOR COURT
	) SS:	
COUNTY OF RANDOLPH	)	2006 TERM
STATE OF INDIANA	)	CAUSE NO.:
	)	68DO1-0402-MI-198
AND THE CITY OF UNION CITY	)	
Plaintiffs	)	
vs.	)	
	)	
VIRGINIA MEISTER	)	
Defendant	)	JUDGMENT

The Plaintiffs, State of Indiana and the City of Union City, Indiana, ("PLAINTIFFS"), appeared by Deputy Prosecuting Attorney, R. Carlton Brumfield. The Defendant, Virginia Meister ("MEISTER"), appeared in person and, by counsel, Dale W. Arnett. The Defendant, John W. Wymer ("WYMER"), was defaulted on December 28, 2004. This matter came on for bench trial on Plaintiffs' Amended Complaint and Meister's Answer and Counter-claim. Witnesses were sworn and evidence presented. The Court took the matter under advisement.

The Court, being duly advised in the premises, now finds:

I. THE PLEADINGS.

1. On February 23, 2004, the Plaintiffs filed Complaint in this matter, pursuant to I.C. 34-24-1-1 et seq., seeking to have forfeited and made available for use a certain 1996 Chevrolet C39 Truck, VIN 1GCHC39F4TE133127 (the "TRUCK"). The Truck was titled in the name of the Defendant, Virginia Meister ("MEISTER"). (Joint Exhibit 1). Plaintiffs made a minor Interlineation amendment. It was alleged that the Truck was used by Wymer to transport a controlled substance for the purpose of committing possession of methamphetamine. The Truck's Certificate of Title is designated Joint Exhibit 1, attached hereto, and, by reference, made a part hereof.)

2. Wymer has defaulted herein.

3. The parties agree that the Indiana Certificate of Title shows Meister to be the title owner.

4. The Plaintiffs allege that Meister either knew or should have known that the Truck was being utilized by Wymer for purposes which would make the Truck subject to seizure pursuant to I.C. 34-24-1-1(a).

5. Meister, admits owning the Truck, but denies all other allegations.

6. Additionally, Meister counter-claims for loss of use of the vehicle and other damages.

II. RULING ON OBJECTIONS.

7. During the trial Meister made three (3) objections which the Court took under advisement.

8. First, during the testimony of Officer William Bradbury, Meister objected to testimony regarding the white powder substance found in the pill bottle which was found under the driver's seat during a warrantless search of the Truck ("OBJECTION 1"). Wymer was arrested for driving while suspended, with a prior. The passenger compartment of the truck was searched incident to arrest. Meister contends that prior to search Wymer had already been arrested, cuffed and placed in the police car and, thus, the search was not incident to arrest. Also, Wymer contends that the officer should not have opened the pill bottle found under the driver's seat. THE COURT OVERRULES OBJECTION 1. The Court notes Black v. State 810 N.E. 2d 713 (Ind. 2004). The pill bottle had the name "Doug Curtner" on it. An officer read "Hydrocodone", a schedule II controlled substance, I.C. 35-48-2-6, when the bottle was found. The Court notes Meister did not claim any interest in the pill bottle or the white substance therein. One traditional rationale for the search incident to arrest was to protect police officers by "removing any weapons that (the arrestee) might seek to use." Stevens v. State, 710 N.E. 2d 277 (Ind. App. 1998). However, this motion has been expanded such that the search of a suspect's automobile is valid under this exception even if the

suspect has been "removed from the scene" and her vehicle is no longer in her area of control. Stevens (supra) When a police officer has made a lawful custodial arrest of the occupant of an automobile, the officer may, as a contemporaneous incident of that arrest, search the passenger compartment of the automobile and examine the contents of any containers found within the passenger compartment so long as the search is supported by probable cause. California v. Acevedo, 500 U.S. 565; 111 S. Ct. 1982: 114 L. Ed. 2d 619 (1991); Jackson v. State, 588 N.E. 2d 588 (Ind. App. 1992). It is a crime for a person to possess a Schedule II controlled substance for which the person does not have a valid prescription. I.C. 35-48-4-6. The officers had probable cause to open the container.

9. Additionally, the Court notes that Wymer had an ink pen on his person which did not have the inner parts but instead had a white powder residue. No objection has been made to this.

10. During further testimony of Officer Bradburn and during testimony of Officer Dennis Smith, Meister objected to testimony regarding the results of field tests performed by Officers on October 22, 2003, the date of the incident alleged herein, and during other prior drug related arrests of Wymer. The further objection during Bradburn's testimony will be called "OBJECTION 2" and the objection during Smith's testimony will be called "OBJECTION 3". Meister objects on the basis that a field test is not scientifically reliable and that only a chemist is qualified to testify with regard to whether

or not a substance is an illegal drug or a controlled substance.

11. THE COURT SUSTAINS OBJECTION 2. The Court sustains objection 2 because there is no foundation laid for giving an opinion on the substance. What training did the person who administered the test have? Where the procedures of the test followed? Is the test recognized as producing reliable results? None of these questions were answered.

12. THE COURT OVERRULES OBJECTION 3. The Court notes that in the criminal case of Burkett v. State, 691 N.E. 2d 1241 (Ind. App. 1998), the Appellate Court found that the reliability of a field test for marijuana had been established. In the instant case, Officer Smith had taken Drug Recognition Courses and had training from the Indiana Drug Enforcement Agency regarding methamphetamine. He was trained to do the field test by his supervisor. The field test had a full set of instructions. He followed the instructions. He testified with regard to the steps he used. He had used the field test on several prior occasions and the field tests had subsequently proven to be accurate. The Court finds that a sufficient foundation had been laid for the testimony to be admitted.

III. ISSUES.

13. The first issue is whether or not the Plaintiffs proved, by a preponderance of the evidence that the property was within the definition of property subject to seizure under section 1 of I.C. 34-24-1. I.C. 34-24-1-4(a).

I.C. 34-24-1-1(a) provides, in applicable part, as follows:
The following may be seized:
(1) All vehicles (as defined by I.C. 35-41-1), if they are used or are intended for use by the person or persons in possession of them to transport or in any manner to facilitate the transportation of the following:

> (A) A controlled substance for the purpose of committing, attempting to commit, or conspiring to commit any of the following:
>
> > (vi) Possession of...methamphetamine (I.C. 35-48-4-6).

14. The second issue is whether or not the Plaintiffs proved Meister had reason to know that the vehicle was being used in the commission of the offense. I.C. 34-24-1-4(a). (Plaintiffs conceded during closing argument that actual knowledge on the part of Meister was not proven.)

15. The third issue comes into consideration only if the Court finds that Plaintiffs have not prevailed and it is whether or not Meister proved damages as a proximate cause of the seizure by a preponderance of the evidence.

IV. DECISION.

16. The Court finds that the Plaintiffs have proven the first issue by a preponderance of the evidence.

17. Wymer was operating and in possession of the Truck. Wymer was also in knowing possession of methamphetamine. Wymer used the Truck to transport the methamphetamine, a controlled substance. I.C. 35-48-4-6.)

18. The Court also finds that the Plaintiffs have proven the second issue by a preponderance of the evidence.

19. The Court observes from the video, Exhibit A, that Wymer refers to the Truck as "my truck." When advised that the Truck was being towed, Wymer asked, "when can I get my stuff and my truck?"

20. The Court finds that Meister is not a credible witness in certain areas of her testimony, including but not limited to the amount of time Wymer used the Truck, her knowledge of Wymer's reputation, where Wymer lived much of the time, and Wymer's arrests prior to October 23, 2003.

21. Meister was aware that Wymer served time in Texas for marijuana. She also bailed him out of jail in February 2003, when he was arrested for possession of cocaine, possession of a controlled substance and dealing a schedule II controlled substance. She claimed she was not aware of his August 28, 2003, arrest for possession of a controlled substance nor his August 30, 2003, arrest for possession of cocaine or narcotics, possession of

marijuana and carrying a handgun without a license. But in other testimony, she indicated that if she had known of the August 2003, arrests at the time, she had forgotten it now.

22. Officers Bradburn and Smith, both reside in Union City, Indiana. They both testified that in October 2003, Wymer had the reputation in the community for being involved with illegal drugs. Smith even testified that Wymer had the reputation as one of the main suppliers of methamphetamine in Union City. Meister claimed to be unaware this reputation of Wymer.

23. On one previous arrest, Wymer had been driving the Truck. Reportedly, at that time, it belonged to the man who sold it to Meister.

24. On February 28, 2003, Wymer gave 412 N. Howard Street, Union City, Indiana as his address. On August 28, 2003, Wymer gave 412 _ Fletcher Avenue, Union City, Indiana, as his address. On August 30, 2003, Wymer gave 412 _ Fletcher Avenue, Union City, Indiana, as his address. Both of these properties are owned by Meister and both are situated on the same lot where Meister has resided.

25. The Court finds that the plaintiffs' prayers should be granted and that Meister should recover nothing on her counterclaim.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court as follows:

1. The Court renders judgment in favor of the Plaintiffs and orders, adjudges and decrees that the Truck is forfeited.

2. Union City, Indiana, per I.C. 34-24-1-4(c), shall have delivery and use of the Truck for a period of three (3) years from the date of this Judgment.

3. After Union City, Indiana, has no further use for the Truck or after the period of three (3) years whichever is earlier, the Truck shall be delivered by Union City, Indiana, to the Randolph County Sheriff for public sale, all per I.C. 34-24-1-4(c).

4. The Court reserves jurisdiction to enter judgment per I.C. 34-24-1-4(d) after further hearing.

5. The Truck is the vehicle identified in Joint Exhibit 1, attached hereto and, by reference, made a part hereof.

6. Virginia Meister shall have and recover nothing on her counterclaim.

7. Costs are assessed against Virginia Meister.

Dated: March 14, 2006.

Peter D. Haviza
Judge, Randolph Superior Court

Distribution:
Prosecuting Attorney
Dale W. Arnett, Attorney for Meister

John W. Wymer, Defendant, 412 N. Howard, Union City, IN 47390
Randolph County Sheriff

Claudia R. Thornburg
Clerk, Randolph Superior Court

APPELLATE OPINION
864 N.E.2d 1137(Ind. App. 2007)

IN THE
COURT OF APPEALS OF INDIANA

VIRGINIA MEISTER	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 68A04-0604-CV-196
	)	
STATE OF INDIANA,	)	
and the CITY OF	)	
UNION CITY, INDIANA,	)	
	)	
Appellees- Plaintiffs.	)	

APPEAL FROM THE RANDOLPH SUPERIOR COURT
The Honorable Peter D. Haviza, Judge
Cause No. 68DO1-0402-MI-198

April 27, 2007

OPINION-FOR PUBLICATION

ATTY FOR APPELLANT:ATTYS FOR APPELLEES:

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Winchester, Indiana

STEVE CARTER
Attorney General of Indiana

ELIZABETH ROGERS
Deputy Attorney General
Indianapolis, Indiana

***1139**
FRIEDLANDER, Judge

Virginia Meister appeals the trial court's judgment forfeiting her truck, which was seized after her son, John Wymer, drove her truck, was arrested for driving while suspended, and had methamphetamine in the truck. Meister presents the following restated issues for review:

1. Did the trial court abuse its discretion by admitting police officers' testimony regarding the methamphetamine found during the search of the truck and the results of a field test identifying a powder substance as methamphetamine?

2. Did the State present sufficient evidence to support the trial court's forfeiture order?

We affirm.

During the evening of October 22, 2003, Union City Police Officer William Bradbury was on patrol when he observed Wymer driving a 1996 Chevrolet truck on Columbia Street in Union City. The truck was titled in the name of Wymer's mother, Meister. Officer Bradbury, who had information that Wymer's

driver's license had been suspended as a result of a prior conviction, followed Wymer, activated his in-car video camera, and contacted the dispatcher to run a license check. Wymer pulled into a convenience store parking lot and went into the store, and Officer Bradbury pulled into an adjacent parking lot and parked so that he was facing Wymer's ***1140** truck. [1]

When Wymer came out of the convenience store, he walked over to Officer Bradbury's vehicle and asked if the officer knew something or had a reason to be there. Officer Bradbury, who was waiting for dispatch to contact him, told Wymer, "no." Transcript at 6. Wymer returned to his truck and sat in it for a few minutes. The dispatcher contacted Officer Bradbury and told him that Wymer's license was suspended as a result of a prior conviction, and Officer Bradbury moved his vehicle near Wymer's truck and walked up to Wymer's driver's side door. Wymer got out of the truck, and Officer Bradbury told him that his license was suspended, arrested Wymer, and placed him in handcuffs. Officer Bradbury searched Wymer's person, and inside Wymer's pocket, Officer Bradbury found a hollowed out ink pen containing a "powdery

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[1] Officer Bradbury testified that his video camera was still running when he parked in the adjacent lot and that he adjusted his camera so that it would show Wymer's driver's side door. We note that this video was introduced as an exhibit at the bench trial and that Meister cites to the exhibit in her brief. This exhibit and the other exhibits introduced at trial, however, have not been transmitted to us as part of the record on appeal. We remind Meister that, as the appellant, she bears the burden of presenting a record that is complete with respect to the issues raised on appeal. Ford v. State, 704 N.E.2d 457 (Ind. 1998).

looking residue." Id. at 7.Officer Bradbury and Union City Ohio Police Officer Dave McHenry searched Wymer's truck, and under the driver's seat, Officer McHenry found a pill bottle, which had the name Doug Curtner on it and contained a "powder residue" that had a "real strong chemical odor." Id. at 8. Upon discovering the pill bottle, Officer Bradbury contacted Captain Dennis Smith to come to the scene to conduct a field test. Captain Smith processed the evidence and conducted "a micro field test" on the substance in the pill bottle, which tested positive for methamphetamine. Id. at 32. Wymer was ultimately arrested for possession of methamphetamine, possession of paraphernalia, and driving while suspended, and Meister's truck was seized.

At the time of Wymer's arrest, he had a reputation in Union City for being involved with illegal drugs and was known as "one of the main suppliers of methamphetamine in Union City." Id. at 36. On February 28, 2003, Wymer was arrested for possession of a controlled substance and possession of cocaine during a traffic stop, and Meister bonded Wymer out of jail. At that time, Wymer was driving the same truck that he was driving when this instant case occurred in October 2003.[2] On August 28, 2003, Wymer was arrested for possession of a controlled substance, and on August 30, 2003, he was arrested for possession of cocaine, possession of marijuana,

[2] In February 2003, the truck was owned by Steve Johnson. Meister purchased the truck from Johnson in August 2003.

and carrying a handgun without a license. Each of these three times that Wymer was arrested, he reported that he lived at the same address where Meister resided or in a residence owned by Meister that was located on the same lot where Meister resided. In addition, Wymer had previously been incarcerated in Texas during the 1990s for a drug offense relating to marijuana.

In February 2004, the State of Indiana and the City of Union City (collectively, "the State") filed a complaint for forfeiture against Wymer and Meister for the forfeiture of Meister's truck and alleged, in part, that Meister was "the registered owner of [the truck] and either knew or should have known [that the truck] was being utilized by defendant John W. Wymer *1141 for purposes which would make said vehicle subject to seizure pursuant to I.C. 34-24-1-1(a)." Appellant's Appendix at 14. In April 2004, Meister filed an answer and counterclaim, alleging that the lawsuit was filed "merely for harassment" and that it was "a frivolous lawsuit." Id. at 20-21. Thereafter, the State filed a motion to dismiss Meister's counterclaim pursuant to Indiana Trial Rule 12(B)(6), and the trial court granted the motion. In December 2004, the trial court, pursuant to a motion by the State entered default judgment against Wymer.

In June 2005, the trial court held a bench trial on the forfeiture complaint against Meister. During the trial, the State introduced testimony from Officer Bradbury regarding the powder substance found in the pill bottle under Wymer's seat, and Meister objected, arguing that the warrantless search was unconstitutional–under both the Fourth Amendment of the United States Constitution and Article 1,

Section 11 of the Indiana Constitution–and was not incident to Wymer's arrest because it had no nexus to his arrest for the driving while suspended. [3] The State argued that Meister did not have standing under the Fourth Amendment to challenge the search pursuant to Wymer's arrest. The trial court took Meister's objection under advisement and stated that it would rule upon the objection when it issued its judgment.

Meister also objected to Captain Smith's testimony regarding the results of the field test conducted on the powder substance in the pill bottle, which revealed that it was methamphetamine, because it was "only a presumptive field test" and argued that the identification of the drug should be established by a State Chemist's report. Transcript at 32. The trial court also took this objection under advisement pending entry of its judgment.

During the trial, Meister testified she was aware that Wymer had been arrested for drug offenses prior to October 2003. Specifically, she testified that she knew he had served time in prison in Texas in the 1990s for a marijuana-related offense and that she knew he was arrested in February 2003 because she bonded him out of jail. She also testified that, at the time of Wymer's two August 2003 arrests, she "might have" known that he was arrested but that she did not remember it at the time of trial. Id. at 48.

On March 14, 2006, the trial court entered judgment in favor of the State and ordered Meister's truck forfeited. In its written order, the trial court

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[3] Meister also objected at trial to the search of the pill container because it was a closed container; however she does not raise any such argument on appeal.

overruled Meister's objections regarding the warrantless search[4] and the identification of the powder substance as methamphetamine and found that the State had proven by a preponderance of the evidence that "Meister had reason to know that the vehicle was being used in the commission of the offense" as required by Indiana Code Ann. Section 34-24-1-4(a) (West, PREMISE current through 2006 2nd Regular Sess.). Appellant's Appendix at 7. Meister now appeals.

Meister argues that: (1) the trial court abused its discretion by admitting certain testimony into evidence; and (2) the evidence was insufficient to support the trial ***1142** court's judgment ordering her to forfeit her truck. We will review each argument in turn.

1.

Meister first argues that the trial court abused its discretion by admitting testimony into evidence. Specifically, Meister contends that the trial court erred by admitting Officer Bradbury's testimony regarding the methamphetamine found during a search of her truck incident to Wymer's arrest and by admitting Captain Smith's testimony regarding the field test results identifying the powder substance as methamphetamine into evidence.

Because the admission and exclusion of evidence falls within the sound discretion of the trial court, we review the admission of evidence only for

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[4] When ruling on the warrantless search in its judgment order, the trial court only addressed the Fourth Amendment and did not specifically rule on whether the search was reasonable under the Indiana Constitution. Additionally, the trial court did not rule on the State's argument that Meister lacked standing to assert a Fourth Amendment challenge.

abuse of discretion. Wilson v. State, 765, N.E.2d 1265 Ind. 2002). An abuse of discretion occurs "where the decision is clearly against the logic and effect of the facts and circumstances." Smith v. State, 754 N.E.2d 502, 504 (Ind. 2001).

We will first address Meister's argument that the trial court abused its discretion by admitting Officer Bradbury's testimony regarding the methamphetamine found during the search of the truck. Meister argues that the search of the truck was unconstitutional-under both the Fourth Amendment of the United States Constitution and article 1, section11 of the Indiana Constitution-and that any evidence relating to methamphetamine found in the truck should not have been admitted at trial. The State counters that the evidence is admissible and that the search did not violate the Fourth Amendment because it was incident to a lawful arrest. The State makes no argument regarding the reasonableness of the search under the Indiana Constitution. We will address Meister's warrantless search arguments under both constitutions.

Meister does not challenge the legality of Wymer's arrest but argues the search violated her Fourth Amendment rights because the scope of the search of her truck incident to Wymer's arrest exceed the permissible bounds for a search incident to arrest.[5] The Fourth Amendment to the United

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[5] During the bench trial, the State argued Meister did not have standing to assert a Fourth Amendment challenge to the search of the truck pursuant to Wymer's arrest. The trial court took it under advisement but did not address the issue of standing in its judgment order. Upon appeal, the State makes no claim in regard to whether Meister may assert the protection of the Fourth Amendment regarding the search of the truck

States Constitution provides, in pertinent part: "The right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated..." U.S. Const. Amend. IV. As a general rule, the Fourth Amendment prohibits warrantless searches. Black v. State, 810 N.E.2d 713 (Ind. 2004). Consequently, when a search is conducted without a warrant, the State has the burden of proving that the search falls into one of the exceptions to the warrant requirement, Id.

***1143** A Search incident to a lawful arrest is one such exception to the warrant requirement. Id. Under this exception, an officer may conduct a warrantless search of the arrestee's person and the area within his or her immediate control. White v. State, 772 N.E.2d 408 (Ind. 2002). "If a defendant is arrested in an automobile, officers are permitted to search the entire passenger compartment of the vehicle, including "closed or open glove compartments, consoles, or other receptacles located anywhere within the passenger compartment, as well as luggage, boxes, clothing, and the like.'" Id. (quoting New York v. Belton, 453 U.S. 454, 460 (1981)). This rule from Belton that a police officer

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pursuant to Wymer's arrest. Therefore, we do not address the issue of Meister's ability to raise the Fourth Amendment challenge but examine the propriety of the search of the truck as if Meister would have established that she personally had an expectation of privacy in the place searched and that her expectation was reasonable. See Everroad v. State, 590 N.E.2d 567, 569 (Ind. 1992) ("in resolving a claim of unlawful search and seizure, an appellate court should not revoke lack of standing, sua sponte"); Dawson v. State, 786 N.E.2d 742 (Ind. Ct. App. 2003) (refusing to address the issue of standing-despite the fact the State had raised it at the trial level-because the State had not raised the issue on appeal), trans. denied.

may search the passenger compartment of a vehicle incident to the lawful arrest of an occupant of the vehicle applies to both "occupants" and "recent occupants," i.e., to situations where the officer makes contact with the occupant while the occupant is inside the vehicle or where the officer first makes contact with the person arrested after the latter has stepped out of his vehicle. Thornton v. U.S., 541 U.S. 615, 622 (2004); see also Black v. State, 810 N.E.2d 713. The Thornton Court explained:

> In all relevant aspects, the arrest of a suspect who is next to a vehicle presents identical concerns regarding officer safety and the destruction of evidence as the arrest of one who is inside the vehicle. An officer may search a suspect's vehicle under Belton only if the suspect is arrested. A custodial arrest is fluid and the danger to the police officer flows from the fact of the arrest, and its attendant proximity, stress, and uncertainty. The stress is no less merely because the arrestee exited his car before the officer initiated contact, nor is an arrestee less likely to attempt to lunge for a weapon or to destroy evidence if he is outside of, but still in control of, the vehicle. In either case, the officer faces a highly volatile situation. It would make little sense to apply two different rules to what is, at bottom, the same situation.

Thornton v. U.S., 541 U.S. at 621 (citations omitted and emphasis in original).

Here, Wymer, who had been driving Meister's truck with a suspended driver's license, was sitting in the truck when approached by Officer Bradbury

and then exited the truck prior to being arrested for driving while suspended and placed in handcuffs. Police officers searched the passenger compartment of the truck upon Wymer's arrest and discovered a pill bottle that contained methamphetamine. Wymer was the subject of a lawful custodial arrest for driving while suspended, and Meister does not challenge the legality of Wymer's arrest. The search of the truck, therefore, was a search incident to a lawful custodial arrest, and it did not violate the Fourth Amendment. See Black v. State, 810 N.E.2d 713 (holding that the search of the defendant's vehicle incident to his arrest for driving while suspended, where the defendant had already exited the vehicle when arrested by police and was placed in handcuffs prior to the search of the vehicle, did not violate the Fourth Amendment).

Meister, however, contends that the search of her truck incident to Wymer's arrest violated the Fourth Amendment because it was not needed for officer safety and would not have produced any evidence relating to Wymer's arrest for driving while suspended because Wymer had already gotten out of the truck when he was arrested and was in handcuffs when the police searched the truck. In support of her argument, she relies on Justice Scalia's ***1144** concurring opinion in Thornton. The State argues, "[i]t is of no consequence where Wymer may have been when the search occurred because the holdings in both Black and Thornton create a bright-line rule that a search of a vehicle incident to arrest is proper even [if] a defendant is not in the car when the arrest physically occurs." Appellee's Brief at 8. We agree with the State.

"The need for a clear rule, readily understood by police officers and not depending on differing estimates of what items were or were not within reach of an arrestee at any particular moment, justifies the sort of generalization which Belton enunciated." Thornton v. U.S., 541 U.S. at 622-23. Indeed, as the Belton Court noted:

> The authority to search the person incident to a lawful custodial arrest, while based upon the need to disarm and to discover evidence, does not depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found upon the person of the suspect. A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification.

New York v. Belton, 453 U.S. at 461 (quoting United States v. Robinson, 414 U.S. 218 (1973)). Thus, Meister's argument that the search of her truck incident to Wymer's arrest violated the Fourth Amendment fails.

Meister also contends the search of her truck incident to Wymer's arrest violated her rights under article 1, section 11 of the Indiana Constitution because there were 'no officer safety issues nor was there any reason to believe that any evidence relevant to [Wymer's arrest for] driving while suspended would be found." Appellant's Brief at 14. Article 1, section 11 of the Indiana Constitution provides that "[t] he right of the people to be secure in their persons, houses, papers, and effects, against

unreasonable search or seizure, shall not be violated...." Automobiles are among the "effects" protected. Taylor v. State, 842 N.E.2d 327 (Ind. 2006). Such a right under article 1, section 11 is a "personal right of the individual whose person, house, papers or effects are searched or seized." Peterson v. State, 674 n.E.2d 528, 533-34 (Ind. 1996), cert. denied, 522 U.S. 1078 (1998).

"While almost identical in wording to the federal Fourth Amendment, the Indiana Constitution's Search and Seizure clause is given an independent interpretation and application." Myers v. State, 839 N.E.2d 1152, 1153 (Ind. 2005). To determine whether a search violated the Indiana Constitution, our courts must evaluate the reasonableness of the police conduct under the totality of the circumstances. Myers v. State, 839 N.E.2d 1152. This requires consideration of both the degree of intrusion into the subject's ordinary activities and the basis upon which the officer selected the subject of the search. Id. Our Indiana Supreme Court has explained the reasonableness evaluation as follows:

> [A]lthough we recognize there may well be other relevant considerations under the circumstances, we have explained reasonableness of a search or seizure as turning on a balance of: 1) the degree of concern, suspicion, or knowledge that a violation has occurred, 2) the degree of intrusion the method of the search or seizure imposes on the citizen's ordinary activities, and 3) the extent of law enforcement needs.

*** 1145** Litchfield v. State, 824 N.E.2d 356, 361 (Ind. 2005). The burden is on the State to show that each relevant intrusion was reasonable in light of the totality of the circumstances. State v. Bulington, 802 N.E.2d 435 (Ind. 2004).

Consideration and balancing the non-exclusive factors identified in Litchfield, we conclude that the interior search of Meister's truck following the arrest of Wymer was reasonable under the circumstances. First, there was a significant "degree of concern, suspicion, or knowledge that a violation has occurred." See Litchfield v. State, 824 N.E.2d at 361. Aside from the driving while suspended violation for which Wymer was arrested, Officer Bradbury found a hollowed-out pen that contained a "powdery looking residue" prior to searching Meister's truck. Transcript at 7. Thus, there was also a degree of concern or suspicion that there was also a violation relating to possession of paraphernalia. See Ind. Code Section 35-48-4-8.3(a) West 2004).

Second, when examining the degree of intrusion the method of the search imposes on the citizen's ordinary activities, we consider the nature of the privacy interest upon which the search intrudes and the character of the intrusion itself. See Litchfield v. State, 824 N.E. 2d 356. Put another way, we consider "the indignity visited upon the citizen." Id. at 360. Here, the degree of intrusion on Meister, at least as to public notice and embarrassment, was extremely minimal because she was not even present when her truck was searched and the search occurred in the evening. See Myers v. State, 839 N.E.2d at 1154 (noting that the intrusion on the defendant, at least as to public notice and embarrassment, was somewhat lessened because of

the hour and place of the search, which occurred after midnight and in driveway of defendant's mobile home); see also Masterson v. State, 843 N.E.2d 1001 (Ind. Ct. App. 2006) (Search occurred after midnight, in front of an apartment building where the defendant was found hiding in the closet, and the vehicle searched was not registered to the defendant), trans. denied.

Third, "the extent of law enforcement needs," Litchfield v. State, 824 N.E.2d at 361 requires consideration of the nature and immediacy of the governmental concern. Some of the factors that may fall into this law-enforcement-needs category include a consideration of the availability of a magistrate to consider issuance of a warrant and the mobility of the vehicle, see Myers v. State, 839 N.E.2d 1146, a means of gathering additional information, see Cochran v. State, 843 N.E.2d 985 (Ind. Ct. App. 2006), trans. denied, and the need to protect the public. See Holder v. State, 847 N.E.2d 930 (Ind. 2006); Frensemeier v. State, 849 N.E.2d 157 (Ind. Ct. App. 2006), trans. denied. Wymer was stopped during the evening hours; thus, prompt access to a magistrate to consider issuance of a warrant may have posed some difficulty. See Myers v. State, 839 N.E.2d 1146. Meister contends that the search was unreasonable because there was no evidence to be found in her truck relating to Wymer's arrest for driving while suspended. We agree that it is unlikely the search of her truck was needed to find and preserve evidence relating to Wymer's crime of driving while suspended, see State v. Moore, 796

N.E.2d 764 (Ind. Ct. App. 2003), trans. denied;[6] *1146 however, as noted above, there was still a possible concern with preserving any potential evidence relating to the discovery of the pen containing the powdery residue and the crime of possession of paraphernalia. While this factor may not weigh as heavily as the remaining two Litchfield factors, there was still some weight attributable to the law enforcement needs. Based on a consideration of the three Litchfield factors, we conclude the interior search of Meister's truck following the arrest of Wymer was reasonable under the circumstances and that Meister's challenge under article 1, section 11 of the Indiana Constitution fails.

In summary, because the search of Meister's truck incident to Wymer's arrest did not violate the Fourth Amendment and was reasonable under article 1, section 11, the trial court did not abuse its discretion by admitting Officer Bradbury's testimony regarding the methamphetamine found in Meister's truck incident to Wymer's arrest.

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[6] In State v. Moore, 796 N.E.2d 764, we held that the search of a vehicle driven by the defendant incident to the defendant's arrest for driving while suspended was not reasonable under the Indiana Constitution because there was no evidence of a concern for officer safety and no evidence concerning a need to search the vehicle to find and preserve evidence connected to the crime of driving while suspended. While the instant case is similar to State v. Moore because the defendant in that case and Wymer in this case were arrested for driving while suspended, the instant case is distinguishable because, here, officer Bradbury discovered a hollowed-out pen containing a powdery residue during a search of Wymer's person, which presented evidence of an additional crime-possession of paraphernalia-and the possible concern with preserving any potential evidence relating to that crime. In addition, we did not analyze the reasonableness of the search in State v. Moore under the three factors enunciated in Litchfield.

Next, we address Meister's argument that the trial court abused its discretion by admitting Captain Smith's testimony regarding the results of a field test identifying the powder substance found in Meister's truck as methamphetamine. During the bench trial, Meister objected to Captain Smith's testimony regarding the field test results and argued it was "only a presumptive field test" and should not be used to prove the identity of the substance. Transcript at 32. The trial court overruled Meister's objection, finding there was a sufficient foundation laid for the admission of Captain Smith's testimony based upon Burkett v. State, 691 N.E.2d 1241 9Ind. Ct. App. 1998), trans. denied.

In Burkett v. State, we upheld the trial court's admission of a police officer's testimony regarding the results of a field test on a green leafy substance that showed it was marijuana because the State had provided a sufficient foundation for the officer's qualifications and the reliability of the field test as required by Indiana Evidence Rule 702. [7] Burkett v. State, 691 N.E.2d 1241. Specifically, we noted that the officer's testimony regarding the field test results was properly admitted because he had provided

---

[7] Indiana Evidence Rule 702 provides:

(a) If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

(b) Expert scientific testimony is admissible only if the court is satisfied that the scientific principles upon which the expert testimony rests are reliable.

testimony that: (1) he had been trained to administer the field test; (2) he followed the proper procedures for the test; (3) explained how the field test worked, including a description of the three ampules of acid that change color to show the presence of marijuana; and (4) the field test was used routinely by the Sheriff's Department. Id.

Here, Captain Smith testified he had completed a drug recognition course and had training from the Indiana Drug Enforcement Agency regarding methamphetamine. He also testified that field testing ***1147** for illegal substances requires the use of specific testing equipment and that based on his visual inspection and chemical odor of the powder substance in the pill bottle, he conducted a "micro field test." Transcript at 32. Captain Smith testified he had been trained by his superior with the Union City Police Department on how to use the field test and explained how the field test worked. Specifically, he testified that this field test was somewhat similar to a pregnancy test and required a small amount of the drug residue to be placed into a sealed container and snapped into a pad, where water was then introduced. He explained that when the water came into contact with the substance and the pad, it would "turn the window to a pink color" if the result was 'positive" and would not change color if the result was "negative." Id. Captain Smith further testified that he had used this field test on several prior occasions and that it had subsequently proven to be accurate. Captain Smith then testified that the field results conducted on the substance in the pill bottle tested positive for methamphetamine

Based on the above, we cannot say that the trial court abused its discretion by admitting Captain

Smith's testimony regarding the methamphetamine field test results, especially here, in a forfeiture proceeding, where the State was only required to prove by a preponderance of the evidence that Wymer was transporting an illegal substance in the vehicle. See Burkett v. State, 691 N.E.2d 1241; see also Jennings. v. State, 553 N.E.2d 191 (Ind. Ct. App.1990) (finding no abuse of discretion in admitting an officer's testimony regarding the identification of marijuana in a forfeiture proceeding where the officer had received training to identify marijuana).

2.

Finally, Meister argues the evidence was insufficient to support the trial court's forfeiture order. Forfeiture cases are civil in nature, and in reviewing the sufficiency of the evidence in a civil case; we consider only the evidence most favorable to the judgment and any reasonable inferences that may be drawn there from. Lipscomb v. State, 857 N.E.2d 424 (Ind. Ct. App. 2006). We neither reweigh the evidence nor assess the credibility of the witnesses. Id. When there is substantial evidence of probative value to support the trial court's ruling, it will not be disturbed. Id. We will reverse only when we are left with a definite and firm conviction that a mistake has been made. Id.

At the time Meister's truck was seized, the relevant portion of the forfeiture statute, Ind. Code Section 34-24-1-1(a) (West 2003), provided that the following may be seized:

(1) All vehicles... if they are used or are intended for use by the person or persons in possession of them to transport or in any manner to facilitate the transportation of the following:

(A) A controlled substance for the purpose of committing, attempting to commit, or conspiring to commit any of the following:

* * * * *

(vi) Possession of Cocaine, a narcotic drug, or methamphetamine (IC 35-48-4-6).

For a trial court to properly order property forfeited, the State "must show by a preponderance of the evidence that the property was within the definition of property subject to seizure under section one of this chapter." I.C. section 34-24-1-4(a). When the property seized is a vehicle, the State "must also show by a preponderance of the evidence that a person who has an ownership interest of record in the bureau of ***1148** motor vehicles [at the time the vehicle is seized] knew or had reason to know that the vehicle was being used in the commission of the offense." Id. (emphasis added); see One 1968 Buick, 4 Door v. State, 638 N.E.2d 1313, 1318 (Ind. Ct. App. 1994) (holding that the relevant time period for the ownership interest is "at the time that a vehicle is seized").

Meister contends the State failed to prove that Meister "knew or had reason to know that the vehicle was being used in the commission of the offense" as required by I.C. section 34-24-1-4(a). The State argues the trial court properly ordered the forfeiture of Meister's truck because the evidence presented showed by a preponderance of the evidence that Meister had reason to know that Wymer was using her truck to transport a controlled substance. We agree with the State.

Here, the State presented evidence-via testimony from Officer Bradbury and Captain Smith-that at the time of Wymer's arrest, he had a reputation in the community for being involved with illegal drugs. Captain Smith specifically testified that Wymer was known as "one of the main suppliers of methamphetamine in Union City." Transcript at 36. The State also presented evidence that Wymer was arrested for possession of a controlled substance and possession of cocaine in February 2003, for possession of a controlled substance in August 2003, and for possession of cocaine, possession of marijuana, and carrying a handgun without a license on another occasion in August 2003. Each of these three times Wymer was arrested, he reported that he lived at the same address in Union City where Meister resided or in a residence owned by Meister that was located on the same lot where Meister resided. Meister testified that Wymer was driving her truck with her permission in October 2003, and she admitted that she knew about Wymer's February 2003 arrest because she had bonded him out of jail and that she knew that he had previously been incarcerated in Texas during the 1990s for a marijuana-related offense. In addition Meister testified that, at the time of Wymer's two August 2003 arrests, she "might have" known that he was arrested but that she did not remember it at the time of trial. Id. at 48.

The trial court found Meister was "not a credible witness in certain areas of her testimony, including...her knowledge of Wymer's reputation...and Wymer's arrests prior to October 23, 2003, and concluded that the State has proved by a preponderance of the evidence Meister had reason to

know that her vehicle was being used in the commission of the offense. Based on the evidence presented, we conclude that the trial court's forfeiture order is supported by sufficient evidence.

Judgment affirmed.

KIRSCH, J., and RILEY, J., concur.

DENIAL OF REHEARING

CLERK

SUPREME COURT, COURT OF APPEALS, AND
TAX COURT
STATE OF INDIANA

217 STATE HOUSE, INDIANAPOLIS, IN 46204
317-232-1930 * FAX 317-232-8365

Kevin S. Smith
Clerk

Cause Number

DALE W. ARNETT

68A04-0604-CV-00196

102 HOSPITAL DRIVE

LOWER COURT NUMBER

68DO1-0402-MI-198

WINCHESTER, IN 47394

FAX NUMBER: 765-584-2068

MEISTER, VIRGINIA –V- STATE OF INDIANA
AND UNION CITY

You are hereby notified that the COURT OF APPEALS has on this day 6/19/07 DENIED APPELLANT'S PETITION FOR REHEARING.

PATRICIA A. RILEY, ACTING CHIEF JUDGE

MS

Witness my name and the seal of said Court,

This 19th day of JUNE, 2007

Kevin S. Smith
Clerk, Supreme Court, Court of Appeals and Tax Court

DENIAL OF TRANSFER
TO
INDIANA SUPREME COURT

D104MI198

CLERK

SUPREME COURT, COURT OF APPEALS, AND
TAX COURT
STATE OF INDIANA

217 STATE HOUSE, INDIANAPOLIS, IN 46204
317-232-1930 * FAX 317-232-8365
Kevin S. Smith
Clerk

Cause Number

PETER HAVIZA

68A04-0604-CV-00196

COURTHOUSE

LOWER COURT NUMBER:

2ND FLOOR

68DO1-0402-MI-198

WINCHESTER, IN 47394

MEISTER, VIRGINIA –V- STATE OF INDIANA
AND UNION CITY

You are hereby notified that the SUPREME COURT has on this day 10/09/07

THIS MATTER HAS COME BEFORE THE INDIANA SUPREME COURT ON A PETITION TO

TRANSFER JURISDICTION FOLLOWING THE ISSUEANCE OF A DECISION BY THE COURT OF APPEALS. THE PETITION WAS FILED PURSUANT TO APPELLATE RULE 57. THE COURT HAS REVIEWED THE DECISION OF THE COURT OF APPEALS. ANY RECORD ON APPEAL THAT WAS SUBMITTED HAS BEEN MADE AVAILABLE TO THE COURT FOR REVIEW, ALONG WITH ANY AND ALL BRIEFS THAT MAY HAVE BEEN FILED IN THE COURT OF APPEALS AND ALL THE MATERIALS FILED IN CONNECTION WITH THE REQUEST TO TRANSFER JURISDICTION. EACH PARTICIPATING MEMBER HAS HAD THE OPPORTUNITY TO VOICE THAT JUSTICE'S VIEWS ON THE CASE IN CONFERENCE WITH THE OTHER JUSTICES.

BEING DULY ADVISED, THE COURT NOW DENIES THE APPELLANT'S PETITION TO TRANSFER OF JURISDICTION.

RANDALL T. SHEPARD, CHIEF JUSTICE
ALL JUSTICES CONCUR.
KM

Witness my name and the seal of said Court,

This 9TH day of OCTOBER 2007

Kevin S. Smith
Clerk, Supreme Court, Court of Appeals and Tax Court

THE 4TH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES OF AMERICA

The 4th Amendment to the U.S. Constitution

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

PERTINENT PORTIONS OF THE TRIAL TRANSCRIPT

The following includes the pertinent portions of the trial transcript showing where and how the Federal Question was raised at trial level and arguments of the State and the Defense.

Q Questions Being Asked by Mr. R. Carlton Brumfield, Deputy Prosecuting Attorney (RCB). (DA) is Mr. Arnett, Attorney for Virginia Meister.

STATE'S WITNESS – OFFICER BRADBURY (DIRECT)

Page 3 Transcript

DA: Your Honor, preliminary matter. Move to enter Joint Exhibit Number 1, it's is a copy of the Indiana Certificate of Title to the truck in question shown it was titled to Virginia Meister.

....

STATE'S WITNESS – OFFICER BRADBURY (DIRECT)

Page 4 Transcript

COURT: Joint exhibit 1 is admitted into evidence and this is the truck in controversy a 1996 Chevrolet C-39 truck?

STATE'S WITNESS – OFFICER BRADBURY (DIRECT)

Page 5 Transcript

....

Q Like to direct your attention to that date if I might and ask you if you had occasion on that date to come in contact with one John Wymer?

A Yes. I did.

....

Q Okay. What are the circumstances surrounding your contact with him on that date?

A On that day, I was on patrol in the 100 block of North Columbia Street and I observed his vehicle pass my vehicle and with him driving.

Q Okay.

A He was going southbound on the 100 block of North Columbia.

Q Was that in, in it's self a note worthy event?

A I was given information just a few days before that, that he was suspended with a prior conviction.

Q Okay. What did you do when you saw him?

A I turned my vehicle around behind his vehicle and activated the in car video camera in my vehicle and also contacted my on duty dispatcher to run a driver's license check.

....

STATE'S WITNESS – OFFICER BRADBURY (DIRECT)

Page 6 Transcript

....

Q After having spoke with your dispatcher what did you do?

A I continued following behind the vehicle waiting for the return on the driver's license check. The vehicle went westbound on Chestnut and eventually pulled into the Pak-a-Sak which at the time was in the 300 block of West Chestnut.

Q What did you do when that happened?

A I pulled just to the parking lot west of that which is the NAPA parking lot and moved my vehicle to face his vehicle with still my video-camera running. I think I adjusted my camera so it would show if you exited the vehicle on the driver's side and then went into the Pak-A-Sak.

Q Okay. Did, well, strike that. Did he seem to realize that you were there at the time?

A I believe so. He eventually came out and came over to my vehicle and spoke with me.

Q Okay. And what was the gist of that conversation?

A He was asking if there was a reason that I was there, if I knew something that he didn't know or.

Q What did you tell him?
A I said at the time, no. I don't know anything and he said okay and eventually went back to his vehicle.

STATE'S WITNESS – OFFICER BRADBURY (DIRECT)

Page 7 Transcript

Q Okay. Then what happened?

A Uh huh. He sit in his vehicle for a few more minutes and my dispatcher contacted me by the radio advised that his license did come back suspended prior. I then moved my vehicle up towards his vehicle and exited my vehicle.

Q Okay. Then what happened?

A I went to the driver's side door. He exited the vehicle. Looked like he was on the phone, had the phone in his hand. he stated that he had received information that his license wouldn't be suspended until later in the month, I believe. That's when I had my dispatcher check the effective date of the suspension which showed that it was, the effective date was October 14th and the traffic stop was on the October 22nd.

Q Okay. What did you do at that time?

A I advised Mr. Wymer that he was under arrest for driving while suspended prior and placed him in handcuffs.

Q Now in affecting that arrest did you conduct a search of either him or the vehicle?

A Yes. I did.

Q Which one?

A Both.

Q Okay. And did you find anything out of the ordinary in either search?

A Yes.

Q And what was that?

A On his person, in his right pocket. I found a ink pen that their inner parts of it had been

removed. In fact the inner parts were not on his person at all. The pen had, you know, residue in it, powdery looking residue inside of it.

STATE'S WITNESS – OFFICER BRADBURY (DIRECT)

Page 8 Transcript

Q Yeah?

A I, myself and Officer McHenry, Dave McHenry from the Union City Ohio Police Department then conducted a search on the suspect vehicle.

Q Okay. What was your reason in conducting a search on the vehicle?

A Search incident to arrest.

....

DA: I would object. Anything that happened. Okay. Once, first of all object to that being a search incident to arrest because Mr. Wymer was actually arrested for driving while suspended and any search of the vehicle had no nexus to driving while suspended and especially a container within the vehicle and even if that search were legal, certainly a search of a container within the vehicle would not be legal, that's a closed container that would require a warrant. No different than

somebody's purse. So, I would object to any, any evidence from the search of the vehicle as not being incident, not having a nexus to the arrest as incident to the arrest and any search of the container as being a warrantless and therefore unconstitutional search that would be pursuant to Article 1 Section 11 of the Constitution of the State of Indiana and also the 4th Amendment of the Constitution of the United States on

STATE'S WITNESS – OFFICER BRADBURY (DIRECT)

Page 9 Transcript

both of those searches.

COURT: All right. Mr. Brumfield, State's response

RCB: If the Court please, State would, would that the position that this is clearly search incident to an arrest, particularly in light of Black v. State, 810 N.E.2d 713, this permits a search in such, such a fashion as was done here...So I think clearly it is a search incident to an arrest. Secondly, I don't think that this Defendant has standing to contest that certainly not on a 4th Amendment basis to contest an arrest regarding the co-Defendant. Perhaps under the, under the Indiana Constitution but, but I don't believe so under 4th Amendment, Judge. So, we would ask the Court to deny the Motion.

COURT: All right. Court, Mr. Arnett?

DA: Yea, Mr. Brumfield brought up rather kinda a new issue whether or not Ms. Meister could challenge the arrest. She certainly has standing to challenge the seizure and/or search of the vehicle in which she has an interest. There's case law directly on point and I believe Mr. Brumfield was involved in it. I can't remember the case up in Portland not too long ago and I think the Appellant Court came back that if somebody owns, owns the property they can challenge a search of that property and that would certainly include the truck and any contents in her truck. And as far as Black v. State, Judge this case is easily distinguished from that case in that particular case they were following a guy all day. He had been dealing drugs out of his truck. They had tips that he was doing it. They had seen people come into his truck. They knew quote unquote that he kept cocaine under his, somewhere up the

steering column and therefore the reason for their stop, this just wasn't a traffic stop there in Black. They were going after the guy for dealing drugs. Here we have got a traffic stop and there is, it's all together different a search incident to arrest to a traffic stop. So does

that mean if you run a stop sign, they are going to pull you out and search your car once you are away from it. I don't think so. So the nexus part is what I'm after.

COURT: Mr. Brumfield.

RCB: If the Court please, two things here. First, the State, or the case of which defense makes reference is Best v. State or State v. Best.

DA: That's it. That's it.

RCB: I forgot which. In that particular case, the Court did in fact decide that the Defendant had no 4th Amendment interest or.

COURT: Court appeals or trial court?

RCB: Court appeals. Well both. But he did have under the, under the Indiana Constitution, he had claimed enough of an ownership interest to give him standing under the Indiana Constitution.

DA: And that is a correct statement, Judge.

COURT: Did either of you have the cite to the Best case?

RCB: It has been very recent, Judge.

DA: It may not even have a North East cite, Judge.

COURT: All right.

RCB: No, it does. It does. We had it, we had it at the Prosecutor's Conference here a couple of weeks ago. But secondly, Judge, with regard to, to the, this case being distinguishable from Black. Certainly there are things that distinguish it from Black but the, the constant here is the commission of a criminal offense not, not an infraction but a criminal offense and that gives rise to the ability of the police to search incident to an arrest....

STATE'S WITNESS – OFFICER BRADBURY (DIRECT)
Page 11 Transcript
COURT: and this is a continuing objection I assuming Mr. Arnett to this entire line of questioning, right?
DA: Yes, it is.

STATE'S WITNESS – OFFICER BRADBURY (DIRECT)
Page 13 Transcript
Q Okay. Now, where was John Wymer when all of this was going on?
A After I conducted the search on his person. I put him in the back of my police vehicle.

STATE'S WITNESS – OFFICER DENNIS SMITH (DIRECT)
Page 35 Transcript

....

Q All right. Now in this particular case you conducted field testing, is that right?
A Correct.
Q What were the results of that tests?

....

A The results were positive for methamphetamine.

PERTINENT PARTS OF MEISTER'S APPELLATE BRIEF

II. ARGUMENT

A. Was the search of the truck legal?

1) Standard of Review.

In reviewing the admissibility of evidence the reviewing Court will reverse a trial Court's ruling only when the trial Court has abused its discretion. Kelly v. State 825 N.E.2d 420, 424 (Indiana Ct. App. 2005). The trial Court, however, has no discretion to reach the wrong result to the extent a ruling is based on an error of law or it is not supported by the evidence. Pruitt v. State 834 N.E. 2d 90, 104 (Ind. 2005).

2) Constitutional Protection

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

.....

The Fundamental Right, under the 4th Amendment is protected by the warrant requirement Black v. State 810 N.E.2d 713 (Ind. 2004). There are exceptions to the warrant requirement and the burden is on the State to prove that at the time of a

search, an exception to the warrant requirement existed. Id.

3) Was this the search "incident to arrest?"

The trial Court relied on Black v. State supra to rule that the search of the truck in this instance was "incident to arrest." In Black, the Indiana Supreme Court relied on Thornton v. United States (541 U.S. 615, 124, S. Ct. 2127 158 L. Ed. 2d 905 (2004) to deduce that the Belton (New York v. Belton) (453 U.S. 154, 101 S. Ct. 2860, 69 L. Ed 2d 768 (1981)) rule of "Search incident to arrest" applied to those who encountered police after they had left their vehicle as well as those who were still in their vehicle when arrested. Black supra at 715, 716.

The language relied upon by the Black Court from Thornton was:

> In all relevant aspects, the arrest of a suspect who is next to a vehicle presents identical concerns regarding officer safety and the destruction of evidence as the arrest of one who is inside the vehicle. An officer may search a suspect's vehicle under Belton only if the suspect is arrested. A custodial arrest is fluid and "the danger to the police officer flows from the fact of the arrest, and its attendant proximity, stress, and uncertainty," The stress is no less merely because the arrestee exited his car before the officer initiated contact, nor is an arrestee less likely to lunge for a weapon or to destroy evidence if he is outside of but still in control of, the vehicle. In either case, the officer faces a highly volatile situation. It would make little sense to apply

two different rules to what is at bottom, the same situation..

The facts of the instant case just simply don't fit the typical reasons for search incident to arrest case. 1) Wymer was outside the vehicle and engaged in discussion with the officer when arrested. 2) The truck was locked. 3) His girlfriend was there to retrieve the truck. 4) Wymer was handcuffed in the back seat of a police car. 5) No plausible evidence related to driving while suspended could have been found in the truck. 6) The police had the keys.

There is no way Wymer could have retrieved a weapon, so the officer safety prong of the analysis must fail. Further, what evidence of driving while suspended could have been destroyed? None!

The United States Supreme Court in Thornton held that when there is a lawful arrest of an occupant of a vehicle, whether he is inside or outside the vehicle, a search "incident to arrest" is permitted. Thornton at 620, 621.

In dicta the Thornton Court stated: ... "while an arrestee's status as a "recent occupant" may turn on his temporal or spatial relationship to the car at the time of the arrest...it...does not turn on whether he was inside or outside...".

The Thornton Court declined to address Thornton's argument that the scope of a Belton search incident to arrest should be limited to those who are within reaching distance of the car, as it was outside the scope of the question on which certiorari was granted. Id at 622.

The Thornton Court also did not rule on whether or not vehicle searches incident to arrest should be limited "to cases where it is reasonable to

believe evidence relevant to the crime of arrest might be found in the vehicle," Id. At 624. The Thornton Court left both of those issues for another day as outside the scope of issues presented.

Another day has come in the case at bar and both issues are relevant to deciding the final outcome. At trial, Meister's counsel objected to the introduction of evidence found as a result of the search of the truck on the basis that any search of the vehicle had no nexus to driving while suspended and that the search was not incident to arrest. Transcript p-8.

The rationale for protection of the police officer doesn't make sense because, Wymer was handcuffed, in the back of the cruiser, the police had the keys, and the truck was locked. There certainly was no threat to the police.

A search of the locked vehicle could not turn up any evidence of driving while suspended.

The Thornton Court addressed these issues in concurring opinions by Justice O'Connor, and Justice Scalia (joined by Justice Ginsberg) and in the Dissent by Justice Stevens (joined by Justice Souter). Count the numbers. 4 in the majority who leave "within reaching distance" and evidence relevant to the crime for another day. 5 who questioned the opinion. The law in this area is simply not well settled.

Justice O'Connor wrote to express her dissatisfaction with the state of the law in this area, especially how the lower Courts now seem to treat search of a vehicle incident to arrest as police entitlement rather than as an exception to the warrant requirement justified by the rationales of officer safety and destruction of relevant evidence. Id. at 624, 625.

Justice Scalia argued that if a person is handcuffed and put in a police car, the police were no longer in danger. Id. 626, 627. He further argued "[i]f...suspects be handcuffed and put in cars then police should...not conduct the search." Id. At 627. Scalia also argued that evidence relevant to the crime of arrestee would make a "search incident to arrest" justifiable. Id. 629, 630, 632.

Scalia further opined:

> [t]wo different rules make sense: When officer safety or imminent evidence concealment or destruction is at issue, officers should not have to make fine judgments in the heat of the moment. But in the context of a general evidence gathering search, the state interests that might justify any over breadth are far less compelling. A Motorist may be arrested for a wide variety of offenses, in many cases there is no reasonable basis to believe relevant evidence might be found in the car...I would therefore limit Belton searches to cases where it is reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle. Id.

Justice Stevens, joined by Justice Souter, questioned authorization to open closed containers absent probable cause...

Further in the dissent Justice Stevens calls the Belton rule a "swollen rule" with no guidance for further application. Thornton supra at 636. He argues that there is no clear definition of an occupant or recent occupant of a car and that the Thornton opinion will "contribute to a massive broadening of

the automobile exception when officers have probable cause to arrest an individual but not search his car."

For the foregoing reasons this Court should rule that the search of the vehicle in this case was not a valid "incident to arrest search" under the 4th Amendment and the evidence found in the search should not have been admitted....

PERTINENT PORTIONS OF THE STATE'S APPELLATE BRIEF

STATE'S BRIEF ON APPEAL

Meister's makes much ado about the basis behind Wymer's arrest, driving while suspended, and the Officer's justification in searching the truck (Appellant's Br. 10-11). However, in Black, the defendant was arrested for driving while suspended while he was outside of his vehicle and the Indiana Supreme Court held that a search of his car incident to his arrest for driving while suspended was proper. Id. at 716. Thus, Meister's argument that the basis of Wymer's arrest could not support a search of the vehicle is without merit. However, in Thornton, the Court specifically address the appropriateness of a search of a vehicle of an individual who is arrested outside that vehicle. Id. at 602-21. The Court opined that the same concerns for officer safety existed regardless as to the location of a defendant at the time of his arrest and this Court need not address Meister's invitation to limit of the holdings in either Black or Thornton. It is of no consequence where Wymer may have been when the search occurred because the holdings in both Black and Thornton create a bright-line rule that a search of a vehicle incident to arrest is proper even a defendant is not in the car when the arrest physically occurs.

RELEVANT PORTIONS OF MEISTER'S REPLY BRIEF

MEISTER'S REPLY

...

The State is right in that Meister made much ado about the crime of driving while suspended as lacking in justification for searching the subject truck. Part of the reasoning is found in footnote 4 of Thornton supra. at 624. There the 4 justices who wrote or affirmed the majority opinion stated:...

> [P]etitoner has never argued that Belton should be limited "to cases where it is reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle...nor did any court below consider Justice Scalia's reasoning...**citation omitted**...("[w]here issues are neither raised nor considered by the Court of Appeals, this Court will not ordinarily consider then"...**citation omitted**...) Thornton at 624.

Those 4 justices refused to consider the argument because it hadn't been raised. More of the reasoning is found in Justice O'Conner's concurring opinion where she wrote: ..."lower court decisions seem to treat the ability to search a vehicle incident to the arrest of a recent occupant as a police entitlement rather than as an exception justified by the twin rationales"...(evidence sought having nexus to crime arrested for and officer safety). She further

wrote that Scalia's approach appeared to be "built on firmer ground" but she wouldn't adopt it because neither side had a chance to "speak to its merit". Id. at 624,25. Justice Scalia joined in his concurring opinion by Justice Ginsberg would "limit...searches to cases where it is reasonable to believe evidence to the crime of arrest might be found in the vehicle." Id. at 632.

More of the reasoning is found in Justice Stevens' dissent with which Justice Souter joined, which he concluded by saying "I fear that today's decision will contribute to a massive broadening of the automobile exception, ...**citation omitted**... when officers have probable cause to arrest an individual but not to search his car." Id. at 636. That makes 5 United States Supreme Court Justices (Stevens and Souter in dissent and Scalia, Ginsberg and O'Connor in concurring opinions) in Thornton supra, who believe that a search of an automobile incident to arrest must be for evidence relevant to the crime of arrest. The other 4 Supreme Court Justices (Rehnquist, Ch.J., Kennedy Thomas, and Breyer) would not address the issue because it was not addressed below. They only made the "bright line ruling" that

> (...while an arrestee's status as a "recent occupant" may turn on his temporal or spatial relationship to the car at the time of his arrest and search, it certainly does not turn on whether he was inside or outside the car at the moment the officer first initiated contact with him). Id. at 621.

PERTINENT EXERPTS FROM MEISTER'S PETITION TO TRANSFER TO INDIANA SUPREME COURT

ARGUMENT

A. The Search of the Vehicle was a 4th Amendment Violation.

The Appellate Court on p. 10-11 of the opinion stated:

> Meister, however, contends that the search of her truck incident to Wymer's arrest violated the Fourth Amendment because it was not needed for officer safety and would not have produced any evidence relating to Wymer's arrest for driving while suspended because Wymer had already gotten out of the truck when he was arrested and was in handcuffs when the police searched the truck. In support of her argument, she relies on Justice Scalia's concurring opinion in *Thornton*. The State argues, "[i]t is of no consequence where Wymer may have been when the search occurred because the holdings in both *Black* and *Thornton* create a bright- line rule that a search of a vehicle incident to arrest is proper even [if] a defendant is not in the car when the arrest physically occurs."…. We agree with the State.

"The need for a clear rule, readily understood by police officers and not depending on differing estimates of what items were or were not within reach of an arrestee at any particular moment, justifies the sort of generalization which *Belton* enunciated." *Thornton v.* U.S. at 622-23. Indeed, as the *Belton* Court noted:

> The authority to search the person incident to a lawful custodial arrest, while based upon the need to disarm and to discover evidence, does not depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found upon the person of the suspect. A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification.

New York v. Belton, 453 U.S. at 461 (quoting *United States v. Robinson*, 414 U.S. 218(1973)). Thus, Meister's argument that the search of her truck incident to Wymer's arrest violated the Fourth Amendment fails.

The Appellate Court, however, failed to recognize that Meister relied not only Justice Scalia's concurring opinion in Thornton supra but also on

Justice O'Conner's concurring opinion, Justice Stevens dissenting opinion, and Chief Justice Rehnquist's opinion of the Court. Part of the Reasoning of Chief Justice Rehnquist is found in footnote 4 of Thornton supra. at 624. There the 4 justices who wrote or affirmed the plurality opinion stated: ...

> [P]etitioner has never argued that Belton should be limited "to cases where it is reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle...nor did any court below consider Justice Scalia's reasoning...**citation omitted**...("[W]here issues are neither raised nor considered by the Court of Appeals, this Court will not ordinarily consider them... **citation omitted**...). Thornton at 624.

Further, the Thornton Court declined to address Thornton's argument that the scope of a Belton search incident to arrest should be limited to those who are within reaching distance of the car, as it was outside the scope of the question on which certiorari was granted. Thornton at 622.The only "bright line" ruling the Thornton Court made was:

> (...while an arrestee's status as a "recent occupant" may turn on his temporal or spatial relationship to the car at the time of his arrest and search, it certainly does not turn on whether he was inside or outside the car at the moment the officer first initiated contact with him). Id at 621.

The plurality in the Thornton Court left both issues (raised here by Meister) for another day as outside the scope of issues presented.

The issues that the Thornton Court declined to address are the issues which Meister raised at trial and on appeal.

The "within reaching distance" goes to the officer safety issue. In the case at bar there obviously was no officer safety concern as

1) Wymer was placed in the police cruiser, in handcuffs when the search of the truck occurred.

2) After Wymer got out of the truck, he talked to someone on his cell phone and engaged the officer in conversation long enough the officer to call his dispatcher and check on the status of Wymer's license. Transcript p.7. If the officer had a safety concern, he would have cuffed and stuffed Mr. Wymer immediately and asked questions later.

As far as evidence relevant to the crime for which Wymer was arrested, the arresting officer arrested him for driving while suspended. Transcript p.7

The Appellate Court agreed on p-14 of the Opinion that it was unlikely that evidence would be uncovered relevant to driving while suspended in a search of the truck.

In the instant case, Officer Bradbury made the type of search that was the concern of all the Supreme Court Justices when he said he was going to make a search incident to arrest for contraband when Wymer was arrested for driving while suspended.

Justice O'Conner expressed concern in her concurring opinion where she wrote..."lower court decisions seem now to treat the ability to search a

vehicle incident to the arrest of a recent occupant as a police entitlement rather than as an exception justified by the twin rationales"...(evidence sought having nexus to crime arrested for and officer safety). She further wrote that Scalia's approach appeared to be "built on firmer ground" but she wouldn't adopt it because neither side had a chance to "speak to its merit". Thornton at 632.

Further concern for the status of the law was expressed in Justice Stevens' dissent with which Justice Souter joined, as he concluded by saying " I fear that today's decision will contribute to a massive broadening of the automobile exception,... **citation omitted**... when officers have probable cause to arrest an individual but not to search his car. Justice Stevens called the Belton rule a " swollen rule" with no guidance for further application. Id. at 636.

If Thornton is to be controlling in this case, then this court must look in depth at the analysis of the United States Supreme Court.

Remember, the "Belton rule" relied on the language of Robinson supra which pertained to the search of a person, not a vehicle. The Thornton plurality used the Belton rule and would not address officer safety or nexus of the crime of arrest to a search of the vehicle as being outside the scope of the questions presented.

Justice O'Conner in concurrence, was dissatisfied with the state of the law as to how Lower Courts treat search of a vehicle incident to arrest as a police entitlement rather than as an exception to the warrant requirement justified by concerns of officer safety and destruction of relevant evidence. Thornton supra at 624, 625.

Justice Scalia joined by Justice Ginsberg argued that if a person is handcuffed and in a police car, the police were not in danger and should not conduct a warrantless search and there should be evidence relevant to the crime of arrest to justify a search incident to arrest. Id. at 626-632.

Justice Stevens joined by Justice Souter in dissent thought a warrantless search of an automobile should not occur if there is probable cause to arrest an individual but not to search his car. Thornton supra at 636.

With its decision in the Case at bar, the Appellate Court has ruled on an undecided question of law as to a federal Question that has not been clarified by the United States Supreme Court. This Court should rule in conformity with the rationale behind the Thornton decision and find the search of the truck unlawful.

RELEVANT EXERPTS FROM STATES BRIEF IN RESPONSE TO PETITION TO TRANSFER

....

ARGUMENT

A. The Search of the Vehicle was not a 4th Amendment Violation.

Meister attempts to cobble together the various concurring and dissenting opinions in Thornton v. United States, 541 U.S. 615 (2004) to fabricate a holding that is contrary to the actual holding of Thornton, then uses her interpretation of Thornton as a basis for claiming:

> With its decision in the case at bar, the Appellate Court has ruled on an undecided question of law as to a federal Question that has not been clarified by the United States Supreme Court. This Court should rule in conformity with the rationale behind the Thornton decision and find the search of the truck unlawful. (Emphasis in original.)

(Appellant's petition to Transfer, p.7.)

Despite her convoluted attempt to obfuscate Thornton, Meister ignores the plain, clear language of the Indiana Supreme Court in Black v. State, 810 N.E.2d 713 (Ind. 2004)...

...Black makes clear that an officer may search a suspect's vehicle only if the suspect is arrested. Id. It is the arrest of the suspect, not the charge for which he is arrested, that authorizes a search of the suspect's vehicle. Thus, Meister's claim that the police had no authority to conduct a

warrantless search of her car because of the unlikelihood of finding any evidence in it pertaining to Wymer's crime of driving while suspended, fails in light of Black, which has already definitively decided the issue Meister attempts to raise on transfer.

PERTINENT EXCERPTS FROM MEISTER'S REPLY TO STATE'S RESPONSE TO PETITION TO TRANSFER

ARGUMENT

A. The search of the vehicle was a 4th Amendment Violation.

Contrary to the State's assertion, Meister does not cobble together various concurring and dissenting opinions in Thornton v. United States, 541 U.S. 615; 124 S.Ct 2127; 158 L. Ed. 2d 905 (2004) to fabricate a holding that is contrary to the holding of Thornton. Meister relies on the 2 concurring opinions, the dissent, and the reasoning in the opinion written by Chief Justice Rehnquist.

The plurality (4 justices) in Thornton stated the Supreme Court would not address the issue of limiting Belton (New York v. Belton 453 U.S. 454; 69 L.Ed.2d 768, 101 S. Ct. 2860) (1981)) "to cases where it is reasonable to believe evidence relevant to the crime of arrest might be found" because that issue was not addressed at any lower court. Thornton supra at 624.

The Thornton court also declined to address Mr. Thornton's argument pertaining to officer safety because it was outside the scope of the question upon which certiorari was granted. That question was whether or not a search incident of arrest should be limited to those within reaching distance of the car. Id. 621

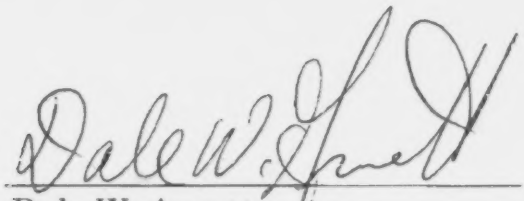
This argument is not convoluted as asserted by the State, but a rational analysis of the entire Thornton case and all its written opinions.

Meister has never argued that location inside or outside of a vehicle determined police authority to make a search incident to arrest. She has argued from the trial forward, that an analysis should be made concerning

1) Officer safety and
2) nexus to the crime of arrest.

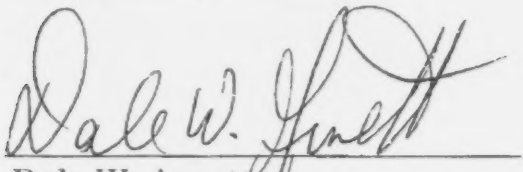
The State would have us believe as is wrote on page 3 of its brief that "[i]t is the arrest of the suspect... that authorizes a search of the suspect's vehicle." The State completely ignores the reasoning in the 2 concurring opinions and the dissent of Thornton and the fact that Thornton's plurality did not address officer safety and nexus to the crime of arrest as required in Camara v. Municipal Court of City and County of San Francisco, 387 U.S. 523, 87 S.Ct. 1727, 18 L.Ed.2d 930 (1967).

I HEREBY CERTIFY THAT ALL OF THE FOREGOING ARE PART OF THE RECORD OF THE CASE AT BAR. (MEISTER V. STATE et. al).



Dale W. Arnett
Attorney at Law

Respectfully submitted,



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